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No. 08-

In the Supreme Court of the United States

Aziz Awad,
Petitioner

v.

United States,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether "[t]he door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall v. U.S.*, 551 U.S. 338, 128 S.Ct. 586, 603-4 (2007) (Scalia, J., concurring).

2. Whether the intent element of 18 U.S.C. § 1347, the health care fraud statute, requires an intent to violate the health care law.

3. Whether federal and state appellate courts deny defendants their Sixth Amendment right to jury trial when juries are misinstructed that the required intent is not an element, when that intent element is hotly contested and supported by defense evidence at trial, and the appellate courts render their own interpretations of the trial evidence to find the constitutional error harmless. Whether this review pattern complies with *Neder v. United States*, 527 U.S. 1 (1999) and the Sixth Amendment.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Aziz Awad respectfully requests a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered on February 27, 2009 (Petitioner's Appendix [PA], pp. 1-22), with the petition for rehearing and rehearing *en banc* denied on February 19, 2009 [PA 23] following the published panel decision which is reported at ***U.S. v. Awad***, 551 F.3d 930 (9th Cir. 2009).

OPINION BELOW (Rule 14.1.(d))

The opinion of the Court of Appeal of the Ninth Circuit panel, which affirmed petitioner's convictions, is found in the Appendix, pp. 1-22.

JURISDICTIONAL STATEMENT (Rule 14.1.(e))

The judgment of the court of appeals was entered on February 27, 2009. Jurisdiction of this court is based upon 28 U.S.C. §1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS (Rule 14.1.(f))

United States Constitution, Amendment V: "No person shall...be deprived of life, liberty, or property without due process of law...."

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

18 U.S.C. §3553(a) The court shall impose a sentence

sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–...

(5) any pertinent Sentencing Commission policy statement

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 1347 states "whoever knowingly and willfully executes... a scheme ... to defraud any healthcare benefit program" commits a crime.

STATEMENT OF THE CASE (Rule 14.1.(g))

Petitioner, a doctor, participated in a respiratory treatment program run by Herman Thomas. Thomas' business leased to doctors several respiratory therapists and equipment and also handled their billing.[1] The doctor's role was to visit Board and Care [B&C] homes, examine patients, diagnose them, and order respiratory treatments for patients. Thereafter, respiratory therapists performed prescribed treatments for the patients. Medicare, through Thomas, was billed under the doctor's provider number for his initial visit and evaluation and also for the subsequent respiratory therapist treatments.

The case centered on the petitioner's level of therapist supervision: was Dr. Awad required to be with or very near the therapists during treatments (called "direct supervision"), or could he be on call (deemed "general supervision")?

The "place of service" [POS] billing code was also an issue. If the service was provided in the B&C, it was not reimbursable by Medicare. But if the doctor wheeled or walked the patient out of the B&C to a medical van for treatment, it was reimbursable. Petitioner used vans occasionally. He testified the mobile equipment the therapists brought to B&C patients warranted an office billing code, and Medicare's "office" definition reasonably included his

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[1] *See* Petitioner's Appendix [PA], pp. 3-7 for the Opinion's recitation of facts. RT refers to the reporters trial transcripts and ER and SER to the excerpts of record filed on appeal.

interpretation that allowed mobile equipment brought to the patient to fall within the applicable billing code.

Over a 45-month period (2000-2003), petitioner, through Thomas' company, billed for thousands of the respiratory procedures. During an audit, the government discovered that 122 billings occurred when the patient was moved from the B&C for care elsewhere. Thus, therapy was arguably not performed in the B&C. But petitioner, being "on call" and not at the facilities during respiratory therapy, testified he had no notice if and when therapists billed for these treatments. The government also argued that petitioner billed for respiratory treatments when he was on vacation, but petitioner testified he always had backup physicians to serve "on call" for any problems.

For the duration of the alleged scheme, no patient reported any complication from therapy. Patients were pre-screened for breathing problems before petitioner did his initial assessments. ER 222: testimony of therapist Fontanilla; RT Dec 14: 23; GER 660: Danny Du's job was to gather initial qualifying patient information; ER 254: petitioner testified about the screening form to determine who qualified for the initial assessment.

As a result of the screening, a high percentage were deemed qualified for treatment, but not all. B&C owner Santos testified only 10 to 15 of her 74 residents received treatments. RTDec15:7-8, 10, 16-17. SER 3-7.

Therapists called by the government testified patients benefitted from therapy. ER 205-206; ER 230.

Petitioner testified he never knowingly billed for treatments not rendered. RTDec 20:66. He testified he believed he needed to be present to perform initial patient assessments, provide a diagnosis and prescribe

a treatment plan. Thereafter, he believed under the Medicare rules he did not need to be present while the therapists gave prescribed therapies. RTDec20:55. Rather, he believed he needed to be "on call" in case a patient might need assistance. *Id.* at 96. He was "on call" and several therapists testified they called with patient related questions.

CONSTITUTIONAL QUESTIONS RAISED

1. A sentence overwhelmingly driven by judge found facts at sentencing and not jury findings is unreasonable under *United States v. Booker*, 543 U.S. 220 (2005), and unconstitutional as applied under the Due Process Clause of the Fifth Amendment, the Sixth Amendment right to a jury trial per *Cunningham v. California,* 549 U.S. 270 (2007), *Blakely v. Washington,* 542 U.S. 296 (2004), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

2. The Healthcare Fraud Statute 18 U.S.C. §1347's intent element requires a specific intent to violate the health care law and not simply a "bad purpose" or general intent to violate the law.

3. This Court must clarify the rule that when a jury is instructed it need *not* find an element of the charge, the error cannot be deemed harmless error when the element is hotly contested and supported by evidence such that a jury could rationally find the required intent not established. *Neder v. United States*, 527 U.S. 1 (1999).

REASONS FOR GRANTING CERTIORARI

Pursuant to Supreme Court Rule 10 and 14(h), as amplified in the following arguments, compelling reasons warrant review of the questions presented.

A. Post-*Booker* Judicial Fact Finding That Dramatically Increases a Sentence From That Permitted by the Jury Verdict is Unconstitutional.

The question remains open in this Court whether it is unconstitutional for a sentencing judge to make fact findings that take a sentence based on a jury verdict from Level 6 (0-6 months) under the United States Sentencing Guidelines to a Level 35 and impose a fifteen year sentence on a medical doctor with no criminal record.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court interpreted the Sixth Amendment to the Constitution to require that, other than the fact of a prior conviction, any fact increasing the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at 490.) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected in a jury's verdict or admitted by the defendant; thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional findings of fact, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. *Accord Blakely v. Washington*, 542 U.S. 296, 301-305 (2004).

United States v. Booker, 543 U.S. 220 (2005) held the mandatory U.S. Sentencing Guidelines

unconstitutional under *Apprendi*, but remediated the matter by deeming the Guidelines advisory and one factor for a sentencing court to consider under its discretionary powers per 18 U.S.C. § 3553(a). Sentences are to be reviewed for reasonableness.

In *Rita v. U.S.*, 127 S.Ct. 2456 (2007), this Court stated it presumes a within the Guidelines sentence is reasonable if: 1) it "reflects a proper application of the Sentencing Guidelines," *Id.*, 2462; and 2) the sentencing court exercised independent judgment and followed 18 U.S.C. §3553(a). *Id.*, 2463.

In post-*Booker* parlance, this 15 year sentence is unreasonable if examined solely on what the jury found. Here, the sentencing court used its own fact-finding to justify the sentence under the Guidelines *and* 18 U.S.C. § 3553(a). In fact, it made its findings on all the Guideline enhancements pre-emptive to the ultimate sentence. As noted in the sentencing court findings, the latter found its own findings "significant" for *both* the Guideline calculation and the § 3553(a) assessment. PA 28.

Petitioner was convicted of 24 health care fraud counts and four related money laundering counts. There was no loss determination required of the jury. Further, the jury made no other findings related to petitioner's conduct. As such, petitioner faced 0-6 months under the advisory Guidelines for the § 1347 counts. The sentencing court made findings, however, to justify a fifteen year sentence under both the Guidelines and § 3553(a).

The sentencing court made the following findings in a written order (PA 23-32) which it adopted at sentencing. RTSept25:17-22.

CATEGORY	LEVEL	GUIDELINE
Base offense level:	+ 6	2S1.1/2B1.1
Loss	+18	2B1.1(b)(1)(J)
Risk of death/injury	+ 2	2B1.1(b)(12)
Role	+ 3	3B1.1(b)
Abuse of trust	+ 2	3B1.3
Vulnerable victim	+ 2	3A1.1(b)(1)
Obstruction	+2	3C1.1
TOTAL	35	(168-210 months)

All but the base offense level were based on judge-made findings. Petitioner argued below that his "sentence does not square with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or *Rita* [*v. United States*, 551 U.S. 338 (2007)]." Opening Brf., pp. 68-69. He cited Justice Scalia's concurring opinion in *Gall v. U.S.*, 551 U.S. 338, 128 S.Ct. 586, 603-4 (2007), which states: "The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury."

At the trial level, petitioner made similar arguments and stated that the only conduct relevant for sentencing was that determined by the jury findings. Defendant Awad's Supplemental Objections to the PSR, p. 1, Dkt.# 208.

There is a continuing tension between *Booker*'s holding that the mandatory U.S. Sentencing Guidelines are unconstitutional under *Apprendi* and *Blakely* and the remedial holding in *Booker*. The latter states that the Guidelines are now non-mandatory and one factor for consideration under 18 U.S.C. § 3553. Here,

the district court findings on amount of loss,[2] risk of death/injury, role, abuse of trust, vulnerable victim, and obstruction drove both the Guideline calculation (itself erroneous under *Apprendi* and *Blakely* because of the judicial findings) and the discretionary sentencing power exercised by the court under § 3553(a).

The sentencing court stated in its written sentencing memorandum: "A number of enhancements are required, most of which Awad contests." PA 26. These "required" enhancements included, as noted above, the court's assessments of loss, risk of death, role, abuse of trust, vulnerable victim, and obstruction due to perjury. PA 26-28. They were found by the court by a preponderance of evidence and by clear and convincing evidence. PA 28, 33.

Following its Guideline calculation, the court then turned to the Sentencing Reform Act (18 U.S.C. § 3553(a)). Here, again, the court's own findings of fact controlled the outcome: "The Court finds that the enhancements have a significant bearing on this analysis." PA 28.[3] Indeed, the court stated,

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[2] The jury was instructed it was *unnecessary* for the "government to prove that anyone actually lost money." ER 95. Even if the billings in the indictment were deemed losses, they amounted to less than $1,000. The money laundering charges totaled $10,000. The trial court found over $2.5 million in losses over petitioner's objections.

[3] While the court elsewhere noted that "the Court will consider the same facts only once unless the facts have additional or different significance under a Section 3553(a)

(continued...)

"Because the Guidelines sentence falls within Zone D, the minimum term (168 months) must be satisfied through imprisonment. U.S.S.G. § 5C1.1(f)." PA 30.

In Justice Scalia's concurring opinion in *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456 (2007), he noted the post-*Booker* problem this case exemplifies. Justice Scalia's second hypothetical points to the defect exposed by the sentencing of petitioner:

> Second, consider the common case in which the district court imposes a sentence within an advisory Guidelines range that has been substantially enhanced by certain judge-found facts. For example, the base offense level for robbery under the Guidelines is 20, United States Sentencing Commission, Guidelines Manual § 2B3.1(a) (Nov. 2006), which, if the defendant has a criminal history of I, corresponds to an advisory range of 33-41 months, *id.*, ch. 5, pt. A, Sentencing Table. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $ 5 million was stolen, then the base level jumps by 18, §§ 2B3.1(b)(2), (3), (7), producing an advisory range of 235-293 months, *id.*, ch. 5, pt. A, Sentencing

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[3](...continued)
analysis" (PA 31, fn. 2), it explicitly found its enhancement findings significant, if not determinative, to both Guideline and §3553 determinations.

> Table. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; *they are the legally essential predicate* for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find none of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive. *Id.* at 2477.

Justice Scalia noted that judge fact-finding still plays a role in sentencing. However, if *Apprendi* is to have meaning in federal sentencing, there have to be limits on such findings: "there is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that must be found in order for a sentence to be lawful, and facts that individual judges choose to make relevant to the exercise of their discretion." *Ibid.* The former must be found by the jury. Judge-found facts cannot be "legally essential" to the sentence without running afoul of *Apprendi*. *Id.*, at 2478.

For Guidelines purposes, the talisman on appeal

has been reasonableness.[4] Here, the force of the judge-made findings in giving a 15 year sentence to a first offender doctor with a family and a history of humanitarian service made the sentence imposed unreasonable. As Justice Scalia's stated: had the court made no findings and simply imposed a 15 year sentence, it would have been unreasonable on its face. The only difference between that scenario and what occurred here are the judge-made findings.

The enhancement findings made by the sentencing court are highly subjective and open to doubt. None, of course, were presented to a jury, admitted by petitioner, or in any way previously adjudicated. Thus, a reviewing court cannot determine how a jury would have resolved them. A jury could easily have disagreed on all of them. For example, even the reviewing court had doubts on the "risk of death/injury" factor given that with all the thousands of therapies over the years of the indictment there was never a reported adverse incident with a patient, and no proof that petitioner's being on call (instead of in the building where the therapies were done) made the patients more at risk. *See* PA 22, upholding the finding in deference to the

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[4] *Compare Washington v. Recuenco*, 548 U.S. 212 (2006), where the Court held that denial of the right to a jury trial on a fact used in a state proceeding to impose an enhanced sentence is not structural error, but subject to harmless error analysis – whether the prosecution can establish beyond a reasonable doubt the jury would reasonably have found the aggravating fact had it been asked to do so. *Id.*, at 126 S.Ct. at 2550-2552, *citing Neder v. United States*, 527 U.S. 1 (1999).

sentencing court "even if we would not have made the same finding."

Review should be granted to resolve the tension existing in post-*Booker* federal sentencing and whether judge-made findings, as occurred in this case, are permitted to support such an aggravated sentence. If permitted, the question remains: how is this result different from pre-*Booker* sentencing when judicial fact finding controlled sentencing? Petitioner submits that if a dramatically elevated sentence is only lawful, that is, if the sentence could only be deemed "reasonable" on appeal when one or more particular findings can be factually sustained, then the Sixth Amendment requires that the jury make that determination.

B. The Intent Element of 18 U.S.C. § 1347 Requires A Specific Intent to Violate the Statute.

The panel erred in describing the requisite intent to violate 18 U.S.C. § 1347. It agreed that the trial court committed constitutional error in instructing the jury that intent to violate the law was not an element of the offense:

> Defendant argues that the jury instructions were erroneous because they stated that the government did not have to prove that Defendant knew his conduct was unlawful. Because the district court's instructions told the jury exactly the opposite of the Supreme Court's definition of "willfully," the instructions were erroneous. PA 15.

The panel then erred in stating the intent required by section 1347's "knowingly and willfully" components of the intent element. The proper statement of the intent is to violate the healthcare law and not just a generic "violate the law" concept. These charges were premised on violations of several Medicare rules and required an intent to violate those rules in order to find a knowing and willful violation of the health care law.

In *Bryan v. United States*, 524 U.S. 184 (1998), this Court stated the following about the intent element of offenses built around federal regulatory programs:

> In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. *See, e.g., Cheek v. United States*, 498 U.S. 192, 201, 112 L. Ed. 2d 617, 111 S. Ct. 604 (1991). n17 Similarly, in order to satisfy a willful violation in *Ratzlaf [v. United States*, 510 U.S. 135 (1994)] we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. *See* 510 U.S. at 138, 149. Those cases, however, are readily distinguishable. Both the tax cases n18 and *Ratzlaf* n19 involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a

> result, we held that these statutes "carve out an exception to the traditional rule" that ignorance of the law is no excuse and require that the defendant have knowledge of the law. *Id.*, 194-195.

The above description captures this case. Petitioner was convicted of the health care statute premised on his violation of several Medicare rules and regulations involving the type of supervision and place of service required for respiratory therapies. About both issues there was much controversy at trial.[5]

The panel, however, citing *Bryan*, states the intent to violate the statute is a generic intent to violate the law. PA 9, 17. Petitioner argued that the criminal intent is more particularized when, as here, the alleged violation of the statute is based upon violations of Medicare newsletter rules and regulations. Such highly technical requirements involving *non-malum in se* conduct warranted the heightened intent requirement of *Cheek* and *Ratzlaf*, *i.e.*, that petitioner knew he was violating the Medicare pronouncements and thus the statute. The intent element for the crime in *Bryan* involved only "willfulness" and not the added "knowingly" element of the statute in this case.

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[5] Petitioner's evidence showed Medicare newsletters arguably went both ways on the issue of supervision. He testified the relevant two CPT code procedures in the charged counts were labeled "diagnostic." RTDec20:76-77,79, 80. Based on Medicare publications, diagnostic billings did not require direct supervision.

In *U.S. v. Hickman*, 331 F.3d 439, 444 (5th Cir. 2003), the Fifth Circuit referenced the intent element of §1347 by noting that although the trial judge did not specifically instruct that "willful" was an element, "it did instruct the jury that it was required to find, beyond a reasonable doubt, that the defendant's purpose was to defraud the health care benefits programs." *See U.S. v. Dearing,* 504 F.3d 897 (9th Cir. 2007) (§1347 requires knowledge conduct was unlawful).

Another healthcare statute, 42 U.S.C. § 1320a-7b(b)(2), the anti-kickback law, requires "appellants knowingly and willfully offered or paid remuneration to induce referrals of program-related business." *Hanlester Network v. Shalala*, 51 F.3d 1390, 1398 (9th Cir. 1995). The Ninth Circuit there held the statute requires specific intent to violate the law. "We construe `knowingly and willfully' in § 1128B (b)(2) of the anti-kickback statute as requiring appellants to (1) know that § 1128B prohibits offering or paying remuneration to induce referrals, and (2) engage in prohibited conduct with the specific intent to disobey the law." *Id.*, at 1400.

This case has the requirements for requiring a specific intent to violate the healthcare fraud law. A doctor has been sentenced to 15 years in custody for violating Medicare rules that were by no means clear or even published as regulations prior to 2002.[6] As in

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[6] Title 42 U.S.C. §1395hh(a)(2), states that no requirement establishing standards for service payment has effect unless promulgated by the Secretary by regulation (as opposed to notice by newsletter publication.)

Cheek, there is every reason to require the government to show the defendant knowingly and intentionally violated the specific rules that made his conduct a healthcare fraud crime.

Further, if the issue is ambiguous, the Rule of Lenity requires petitioner's statutory interpretation. *Liparota v. United States*, 471 U.S. 419, 426 (1985) (ambiguity concerning the ambit of criminal statutes is to be resolved in favor of lenity).

C. A Jury Erroneously Instructed That the Required Intent to Violate the Law Need Not Be Found Cannot Be Deemed Harmless Error When the Element Was Hotly Contested at Trial and Supported by Evidence Such That the Jury Could Have Rationally Found Intent to Violate the Health Care Law Was Not Established. *Neder v. United States*, 527 U.S. 1 (1999).

Too often the federal courts of appeal have, as in this case, misapplied the controlling holding in *Neder* to deem errors harmless based on the appellate court's assessment of the quality of the trial evidence. That error was decisive here. The jury was instructed it need not find the unlawful intent element of the offense. The prosecutor argued that instruction to urge to the jury that the required intent need not be considered. The evidence of intent to knowingly violate the law was hotly contested in a lengthy trial.

While the panel opinion found the error harmless under its erroneous construction of the intent element, it also erred in its *Neder* analysis. In *Neder*, this Court stated the appropriate review standard when the element of the offense is missing

from the jury instructions:

> Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflect a denigration of the constitutional rights involved." *Rose* [*infra*] 478 U.S. at 577.

Id. at 19-20. Thus, where the defendant contests the omitted element, as petitioner certainly did, and raised evidence sufficient to support a contrary finding, as he did, the error cannot not be deemed harmless. *Ibid.* A contrary finding on the omitted intent to violate the health care law was a rational possibility here.[7] As *Neder* holds, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." *Id.*, at 19.

When petitioner was asked during his testimony if he believed he was doing something wrong or

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[7] Appellate courts must always resist the temptation to "transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 613-614 (1946). "A reviewing court in such a case can only engage in pure speculation -- its view of what a reasonable jury would have done. When it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281(1993), *quoting Rose v. Clark*, 478 U.S. 570, 578 (1986).

unlawful in his billing Medicare he answered emphatically in the negative.

> Q Now, Doctor, between January of 2000 and September 2003, did you believe that you were doing anything wrong, anything unlawful?
> A Never. ER 272.

His testimony was supported by evidence to support his belief that he was not violating the statute. He testified that Herman Thomas, a professional Medicare biller, did the billing for him. He cited Medicare publications to support his defense that he was not attempting to disobey the law. He showed that the relevant regulations on the procedures in question were not even officially published until January 2002. In *U.S. v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349, 1356 (11th Cir. 2005), a *civil* healthcare fraud case, the court noted "the regulatory language in effect until January 1, 2002 was ambiguous" pertaining to the very same therapies involved in this case. This case was tried on the basis of whether petitioner knew from Medicare rules or the belatedly published regulations that he was to be "personally present" when respiratory therapies were given by the therapists, and whether the place of service could be the Board & Care home.

Because he had evidentiary support for his position and a properly instructed jury rationally could have found a reasonable doubt on the intent element to violate the health care statute, the error could not be deemed harmless.

But the panel did its version of a *Neder* assessment, an unfortunately common approach with many appellate courts that violates *Neder*'s two

pronged approach. The panel used considerations that beg *Neder*'s two questions (*i.e.*, was the issue contested and was there evidence a rational jury could have used to reject the element?) Instead, at PA 18-21, the panel found the following determinative:

1) That each billing contained a certification to Medicare stating that submitting "any false, incomplete or misleading information" could subject him to criminal liability and punishment. The panel stated it was undisputed petitioner signed these either "physically or electronically when he submitted the claims." Actually, the charged billings were electronically filed by the biller, Herman Thomas. Petitioner testified: "Herman Thomas would do all the billing to Medicare and Medi-Cal." RTDec20:95. Thomas also testified he was "responsible for doing the billing in this case." RT Dec21:68. Donna Knobloch, the government expert, testified petitioner submitted all of his claims electronically. None were signed by petitioner. RTDec8: 143-144.

Petitioner denied he ever knowingly violated any Medicare regulation or rule. So, even if his electronic signature appeared on a form, it did not demonstrate petitioner's intent to violate the healthcare law.

2) Other instructions were said to alleviate the constitutional error. Thus, the jury was told the government was required to prove petitioner acted with an "intent to defraud." This is a civil fraud concept and is *not* synonymous with the required lack of an intent to violate the criminal statute. *E.g., U.S. v. R&F Properties of Lake County, Inc., supra.* If the panel were correct, there would be no difference between civil fraud and a criminal violation of the

statute.

Also meritless was reliance on the money laundering count and good faith instructions to serve as intent surrogates. The rationale is circular and wrong. As to good faith, the jury was told that petitioner's belief in the lawfulness of his conduct was not an issue; thus, a good faith belief in lawfulness was made irrelevant by the tainted instruction. The money laundering instructions only compounded the error in the fraud counts. They repeated the lack of need to find an unlawful intent on the healthcare fraud counts:

> To prove health care fraud, I indicated to you that the government is not required to prove that the defendant knew that his acts or omissions were unlawful. That is also true for money laundering except with regard to one aspect of the crime, the source of the funds. [¶] The government must prove that the defendant knew that the funds transferred represented the proceeds of unlawful conduct, violation of the health care fraud statute. The government need not prove that the defendant knew that the transfer of the funds was unlawful. RTDec21:127; ER 99.

A jury that had just convicted on the healthcare fraud offenses without finding an intent to violate the law would necessarily have found the conduct "unlawful," and thus that petitioner "knew" the funds came from the unlawful conduct. But this too is

entirely circular. Having found guilt on the healthcare fraud counts (without finding the critical element of intent), the jury had to find petitioner knew the money from Medicare was derived from that conduct. This instruction did not require a finding of intent to violate the healthcare law initially, thus making the money laundering finding, premised on convictions of the fraud counts, wrong as well.

3) Finally, the panel relies on the alleged fraudulent conduct itself, which it contends was so bold and simple that no reasonable person could have thought it lawful. An example given is the alleged billing for services not provided. PA 20. Petitioner testified he never knowingly billed for treatments not rendered. RTDec 20:66. He testified he believed he needed to be present to perform initial patient assessments, provide a diagnosis and prescribe a treatment plan. He did perform those services. Thereafter, he believed under the Medicare rules he did not need to be present while the therapists gave prescribed therapies. RTDec20:55. He believed he needed to be on-call in case there might be a need for assistance. *Id.* at 96.[8] There was no evidence petitioner submitted billings for treatments that he did not render. Of the thousands of therapist respiratory treatments over the almost four years of the indictment, 122 were submitted by therapists that

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[8] This was not an unreasonable assessment given that the therapies were basic, non-invasive procedures that posed no risk of injury, serious or otherwise, to patients. No patients reported adverse side effects from the treatments over the nearly four years of the charged conduct. *See* PA 22.

were probably false. But there was no showing petitioner was ever aware of, or had anything to do with, those billings. He strenuously denied knowing of or condoning them.

Petitioner's defense demonstrated he was brought to the business of providing respiratory treatments to Board & Care residents by Medicare biller, Herman Thomas. Thomas, as he did for other doctors, performed petitioner's billing electronically. As petitioner testified, he was the treating doctor and not involved with day-to-day billing. RTDec20:66. Therapists testified that patients benefitted by the respiratory treatments (RTDec9:41; RTDec13:159), and that patients were pre-screened based on a need for respiratory treatment. RTDec7:146-148; ER 160-162. They testified petitioner was "on call" to them. Therapist Fontanilla testified petitioner was always available by phone. RTDec9:225; ER 225. Therapist Gonzales testified he called petitioner requesting treatment reductions as needed and petitioner cut them back if improvement was shown. RTDec13:160, 176-177; ER 235-236. In short, there was nothing obviously illegal about the billing practice from petitioner's perspective and his evidence formed a rational basis for finding reasonable doubt.

The issue of harmless error review permeates almost all appellate decision making. Yet, many appellate courts, such as the one below, misapply or fail to apply the *Neder* standard and instead perform the role of a trial jury in assessing the facts of the case in order to hold harmless errors by finding "overwhelming evidence." This is the precise danger Justice Scalia, joined by Justices Souter and Ginsburg, dissenting in *Neder*, predicted, that is, that the remedy

for the constitutional violation by the trial court is now a repetition of the same violation by judges sitting on the courts of appeal. 527 U.S. at 30-40. *See* Justice Steven's *Neder* concurrence stating that harmless error doctrine "may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings."[9] *Neder, supra* at 27. *See also* Carter, "Sporting Approach to Harmless Error in Criminal Cases: the Supreme Court's 'No Harm, No Foul' Debacle in Neder v. United States," 28 Am. J. Crim. L. 229, 241 (2001) ("Allowing an appellate court to decide guilt or innocence on an element of a crime 'throws open the gate for appellate courts to trample over the jury's function,'" *quoting* Justice Scalia's dissent).

Petitioner never had a jury trial on the intent element of the charged § 1347 offenses because the jury was told it need not bother to assess the element. In such cases, if harmless error doctrine is to apply under *Neder*, it must be given the strict scope intended by that decision (*i.e.,* was the issue contested and supported by rational evidence that would allow a reasonable doubt finding?), and not morphed into the broad talisman for appellate courts to affirm convictions based on appellate redeterminations of evidentiary weight. *See* Davis, 25 T. Marshall L. Rev. 45, 77, "Harmless Error in Federal Criminal and Habeas Jurisprudence: the Beast That Swallowed the Constitution" ("reviewing judges may be tempted merely to affirm the action below by relying on their

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[9] *Quoting Pope v. Illinois,* 481 U.S. 497, 509 (1987) (Stevens, J., dissenting).

feeling that, having considered the whole record, the end result below was probably justified, and any errors in the process of reaching the end result therefore must have been harmless.")

This is an important issue affecting many, if not most, cases, state and federal, where constitutional error is found but erroneously deemed insignificant to the result. It is worthy of this Court's *certiorari* jurisdiction.

CONCLUSION

It is respectfully requested that the Court grant certiorari on the questions presented.

April 20, 2009 Respectfully submitted,

/s/ Charles M. Sevilla
CHARLES M. SEVILLA
Attorney for Petitioner Awad

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AZIZ F. AWAD,
Defendant-Appellant.

D.C. No. 06-50578

CR-04-00237-JVS

OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
November 18, 2008—Pasadena, California

Filed January 12, 2009

Before: Susan P. Graber and Richard R. Clifton, Circuit Judges, and Edward C. Reed, Jr.,*District Judge.

Opinion by Judge Graber

*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

COUNSEL

Charles M. Sevilla, San Diego, California, for the defendant appellant.

Douglas F. McCormick, Assistant United States Attorney, Santa Ana, California, for the plaintiff-appellee.

OPINION

GRABER, Circuit Judge:

Defendant Dr. Aziz F. Awad stands convicted of 24 counts of participating in a scheme to defraud Medicare under 18 U.S.C. § 1347 and four counts of money laundering involving the proceeds of health care fraud under 18 U.S.C. § 1956(a)(1)(A). He alleges four errors that we address here:

(1) omission of the word "willfully" from the portion of the indictment alleging violations of 18 U.S.C. § 1347; (2) a multiplicitous indictment; (3) jury instructions stating that the jury need not find that Defendant knew his conduct was unlawful; and (4) application of a sentencing enhancement under U.S.S.G. § 2B1.1(b)(12)(A) (2005) for creating a risk of serious bodily injury or death.[1] For the reasons explained below, we affirm.

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[1] Defendant also argues that several of the district court's other jury instructions, evidentiary rulings, and expert witness rulings were erroneous. On those issues, we agree with the district court's reasoning and conclusions and, therefore, affirm. *Tilcock v. Budge*, 538 F.3d 1138, 1143 (9th Cir. 2008), *petition for cert. filed*,__ U.S.L.W. (U.S. Oct. 31, 2008) (No. 08-7077); *Hoefler v. Babbitt*, 139 F.3d 726, 729 (9th Cir. 1998).

FACTUAL AND PROCEDURAL HISTORY

A. *Medicare Reimbursement*

Testimony at trial explained the procedures through which physicians are reimbursed for services rendered to Medicare insured patients. Medicare provides insurance coverage for persons over age 65 and for certain disabled persons. Physicians must apply to provide services to Medicare beneficiaries. In order to be accepted, physicians must follow medicare's rules and regulations, submit accurate claims, and accept Medicare's payment for services rendered. The Medicare Carriers Manual is a compilation of Medicare's interpretation of its rules and regulations for payment of claims. Medicare also sends physicians newsletters that contain billing information, guidelines, rules, and regulations.

To obtain payment from Medicare for services rendered to a beneficiary, a provider submits a claim form. The claim form requires the provider to list a provider number, a procedure code, and a place-of-service ("POS") code. The physician must certify on the claim form that "the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision, except as otherwise expressly permitted by Medicare or [applicable] regulations." Each claim form also provides that "[a]ny person who knowingly files a statement of claim containing any misrepresentation or any false, incomplete or misleading information may be guilty of a criminal act punishable under the law

and may be subject to civil penalties."

When someone other than a physician performs the service for which Medicare is billed, certain supervision requirements must be satisfied. The requisite level of supervision depends on the place where the medical visit occurs. If the services are performed outside the physician's office setting, non-physician's services are covered as "incident to" the physician's service only if there is "direct personal supervision" by the physician. When services are provided in an institution such as a convalescent home, the availability of the physician by telephone, or even the presence of the physician somewhere else in the building, does not constitute direct personal supervision.

Medicare regulations provide POS codes that show the type of location where a service is performed. The physician is responsible for choosing the POS code that is most appropriate. A service provided in the physician's office is coded "11," while a service provided in a "board-and-care facility" is coded "33." Medicare does not pay physicians for respiratory treatments given in board-and-care facilities—that is, respiratory treatments denoted with POS code 33—even if they are directly supervised by the doctor.

B. *The Fraudulent Scheme*

Defendant owned Active Care Medical Group and became a Medicare provider in 1996. In early 2000, Defendant met with co-defendant Herman Thomas, who owned a billing company and a respiratory therapy company, to discuss providing respiratory

services to board-and-care facilities.[2] Defendant's medical practice was struggling financially at the time. Thomas told Defendant that Defendant's role in the respiratory treatment program would be to evaluate patients and supervise therapists. Thomas, who is not a physician, said that he would take primary responsibility for providing the therapists and for doing the billing.

Defendant and Thomas hired marketers to find board-and-care facilities where Defendant could evaluate patients for respiratory problems. Most of the facilities that participated housed mentally ill patients who had Medicare or Medi-Cal insurance. Defendant began seeing Medicare and Medi-Cal patients at various board-and-care facilities in March 2000.Defendant performed initial assessments on those patients to determine whether they needed respiratory treatment. One of Defendant's therapists testified that Defendant ordered respiratory therapy for "about 100%" of the patients he saw.

In late 2000, the California Department of Health Services conducted an audit of Defendant's Medi-Cal billings. The audit showed that some services that were billed were not actually rendered; that the documentation provided did not establish medical necessity for the services billed; that documentation on patients was "predetermined and preprinted," and therefore not "patient-specific"; and that respiratory

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[2] Thomas and Defendant were tried jointly. Both were convicted of 24 counts of health care fraud and four counts of money laundering.

treatments were not being rendered in accordance with Medi-Cal policy. Defendant received a letter cataloguing these deficiencies dated July 3, 2001. The letter notified Defendant that he had been placed on "special claims review," meaning that he had to submit billing forms in hard copy so that a claims examiner could review them personally before any payment was issued. After receiving that letter, Defendant stopped submitting claims to Medi-Cal.

Medicare also began an audit of Defendant's billings after receiving a patient complaint that services billed had not been rendered. The investigative report showed that Defendant was seeing up to 114 patients per date of service, based on the number of claims submitted. There were numerous occasions on which 90 or more patients were seen on one day, according to billing records. In a sample of 35 patient files, Defendant billed for six patients whom he allegedly treated at board-and care facilities, when the patients were hospitalized elsewhere on the dates claimed. Defendant also consistently used POS code 11, which is reserved for office visits, for treatments provided at board-and-care facilities. Defendant's billing for a certain respiratory treatment was 14 times the number, and18,000 times the amount, than that of the next highest biller in Southern California for that same type of treatment. For another treatment, Defendant billed 28 times the number and42,000 times the amount of the next highest biller. A follow up investigation revealed that Defendant billed Medicare for more than $460,000 for treatments performed by his therapists while he was out of the country.

From 2000 to 2003, Defendant billed Medicare approximately$7.4 million for respiratory treatments. Medicare allowed $2,561,819 of those billings and, from January 2000to September 2003, Medicare paid claims of $2,035,968.Medi-Cal suffered a loss attributable to Defendant of$589,754.

As a result of these activities, Defendant was charged with24 counts of participating in a scheme to defraud Medicare under 18 U.S.C. § 1347 and with four counts of conducting monetary transactions involving the proceeds of health care fraud under 18 U.S.C. § 1956(a)(1)(A). The case proceeded to trial. At the close of evidence, Defendant moved for a judgment of acquittal, asserting, among other arguments, that the indictment against him was insufficient because it did not use the word "willfully" with respect to the health care fraud allegations. The district court took the motion under submission. The jury found Defendant guilty of all 24 counts of health care fraud and all four counts of conducting monetary transactions involving the proceeds of health care fraud. After the verdict, Defendant renewed his motion, and the court denied it. Defendant was sentenced to 180 months' imprisonment; three years' supervised release; restitution in the amount of $2,625,722; and a $2,800 special assessment. This timely appeal followed.

DISCUSSION

Defendant asserts on appeal that the indictment was insufficient; that the indictment was multiplicitous; that the jury instructions erroneously stated that the jury need not find that Defendant knew his actions

were unlawful and that the error was prejudicial; and that the two-level sentencing enhancement for creating a risk of serious bodily injury or death should not apply. We address each argument in turn.

A. *Sufficiency of the Indictment*

[1] We review de novo the sufficiency of an indictment. *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir. 1995).An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is sufficient if it contains "the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." *Alber*, 56 F.3d at 1111 (internal quotation marks omitted). The test for sufficiency of the indictment is "not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *United States v. Hinton*, 222 F.3d664, 672 (9th Cir. 2000).

[2] Section 1347 states in part: "Whoever knowingly *and willfully* executes, or attempts to execute, a scheme or artifice to defraud any health care benefit program . . . shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 1347(1) (emphasis added). The indictment in this case for counts 1 through 24 alleged that, between January2000 and September 2003, within the Central District of California, Defendant and Thomas "knowingly and with the intent to defraud, devised, executed, and participated in a scheme to defraud

Medicare." Defendant argues that the omission of the word "willfully" from the indictment renders it insufficient and that, as a result, counts 1 through 24 must be dismissed.[3]

[3] An indictment must be read in its entirety and construed with "common sense and practicality." *Alber*, 56 F.3d at1111. In *Alber*, the defendant challenged an indictment that failed to allege that he acted with the "intent to extort." *Id.* at1112. We held that the indictment had set forth the essential facts with sufficient specificity to infer intent. *Id.* The court reasoned that a threatening letter described in the indictment amounted to "per se extortion," and "[c]ommon sense would tell any reader that the letter was sent with the intent to extort." *Id.*

[4] Similarly, here, an inference of willfulness is obvious because of the facts alleged in the indictment. The United States Supreme Court has held that, in the criminal context, a "willful" act is "one undertaken with a 'bad purpose.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998). In the present case, although the word "willfully" does not appear in the indictment, sufficient facts were pleaded so that any reader would infer that Defendant acted with a bad purpose.

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[3] Counts 25 through 28 charge violations of 18 U.S.C. § 1956(a)(1)(A),which requires only that the person "knowingly," but not "willfully," conduct transactions using the monetary proceeds of fraud. The indictment for counts 25 through 28 alleged that Defendant "knowingly and willfully"conducted monetary transactions involving the proceeds of health care fraud. This portion of the indictment is not challenged.

[5] The indictment alleged that Defendant directed respiratory therapists to create medical records showing that they had performed respiratory treatments when such treatments were not actually performed, and that Defendant billed Medicare for such treatments even though they did not occur. The indictment further alleged that, "[i]n carrying out the fraudulent scheme, acting with intent to defraud and deceive,"Defendant communicated false statements in Medicare billings. It alleged that Defendant knew that such statements were false and that the acts described in the indictment were"fraudulent, unlawful, and deceptive." The indictment described seven specific kinds of acts that Defendant allegedly knew were fraudulent.[4] Finally, the indictment provided that, in carrying out the scheme, "acting with intent to defraud and deceive," Defendant concealed facts from Medicare about his "fraudulent business practices regarding the delivery of and payment for the Respiratory

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[4]The indictment alleged that Defendant knew the following: (a) that Defendant was neither providing, nor supervising[,] the Respiratory Treatments being billed to Medicare; (b) that the Respiratory Treatments being billed to Medicare were not being provided in Defendant's medical office in Anaheim; (c) that Medicare does not pay for the Respiratory Treatments if such treatments are performed on patients at residential board and care facilities; (d) that Medicare does not pay for the Respiratory Treatments which are not provided and directly supervised by a physician; (e) that Medicare does not pay for the Respiratory Treatments if such treatments are provided by unlicensed individuals;(f) that Medicare does not pay for the Respiratory Treatments if such treatments are not provided; and (g) that Medicare does not pay for the Respiratory Treatments if billing for such treatments are based upon falsified and forged medical records.

Treatments."

[6] When construed with "common sense and practicality,"as *Alber* requires, the indictment as a whole conveyed that Defendant acted "with a 'bad purpose.'" *Bryan*, 524 U.S. at191. *Hinton* directs that the question is not whether the indictment could have been framed in a more satisfactory manner, but whether it meets minimum constitutional standards. 222 F.3d at 672. Omission of the word "willfully" was not fatal, as the indictment sufficiently informed Defendant of the charges against him because of the nature and specificity of the facts alleged.

[7] Defendant responds by citing *United States v. Du Bo*,186 F.3d 1177, 1179 (9th Cir. 1999). *Du Bo* held that if an indictment completely fails to recite an essential element of a charged offense and the insufficiency is properly challenged before trial, the omission is "not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *Id.* That case addressed an indictment that failed to allege the requisite mental state of "knowingly or willingly." *Id.* The indictment alleged only that the defendant "unlawfully" affected commerce by the"'wrongful' use of force," an allegation that, standing alone, was insufficient. *Id.*

[8] *Du Bo* does not apply here for two reasons. First, Defendant challenged the indictment during trial, not before trial as in *Du Bo*. We cautioned in *Du Bo* that our holding was"limited to cases where a defendant's challenge is timely." *Id.* at 1180 n.3. When, as in the present case, a defendant's challenge is not brought

before trial, the indictment is "liberally construed" because the defendant had an opportunity to resolve any ambiguity in the indictment through a pre-trial motion. *See United States v. Chesney*, 10 F.3d 641, 642-43(9th Cir. 1993) (holding that a challenge brought at the close of the government's case was untimely and that the indictment would therefore be afforded a liberal construction).

[9] Second, the indictment here did not completely fail to recite an essential element of the charge. A "liberal" and"common sense" reading of the indictment signals unmistakably that Defendant acted with a bad purpose, which is the Supreme Court's definition of "willfully." *Bryan*, 524 U.S. at191-92. Although the detailed factual allegations may not be a full substitute for the word "willfully," the government did not completely fail to allege that Defendant acted with an improper purpose. We therefore reject Defendant's challenge to the indictment.

B. *Multiplicity*

Whether an indictment is multiplicatus is generally reviewed de novo. *United States v. Vargas-Castillo*, 329 F.3d715, 718-19 (9th Cir. 2003). Here, however, because Defendant did not raise the argument below, we review only for plain error. *United States v. Olano*, 507 U.S. 725, 730 (1993); Fed. R. Crim. P. 52(b).

Defendant argues that the 24 counts of health care fraud (or all but one of them) should be dismissed because they are multiplicitous. He characterizes the government's indictment as charging 24 acts in

furtherance of a single scheme, rather than 24 separate executions of a scheme to defraud Medicare.

[10] An indictment is multiplicitous if it charges a single offense in more than one count. *United States v. Garlick*, 240F.3d 789, 793-94 (9th Cir. 2001). "The test for multiplicity is whether each count 'requires proof of a[n additional] fact which the other does not.'" *Id.* at 794 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (wording alteration added by *Garlick*)).

[11] We find persuasive the reasoning of *United States v. Hickman*, 331 F.3d 439, 445-47 (5th Cir. 2003), which held that each fraudulent claim submitted to Medicare could form the basis of a separate count. The health care fraud statute punishes one who "knowingly and willfully executes, or attempts to execute" a scheme to defraud Medicare. 18 U.S.C.§ 1347. *Hickman* reasoned that, because the health care fraud statute's text and structure are "almost identical" to the bank fraud statute's text and structure,[5] and the Fifth Circuit had interpreted the bank fraud statute as criminalizing each execution of a scheme to defraud, the health care fraud statute, by analogy, likewise punishes each execution of a scheme to defraud. 331 F.3d at 445-46. The *Hickman* court also concluded that each submission of a fraudulent claim to Medicare constituted an "execution" of the scheme to defraud because, with each submission, the

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[5] The bank fraud statute reads, in pertinent part: "Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution . . . shall be fined . . . or imprisoned . . . ." 18 U.S.C.§ 1344(1).

defendant owed a "new, independent obligation to be truthful to the insurer." *Id.* at 447.

[12] We, too, have held in the context of bank fraud that each execution of the scheme to defraud may be charged asa separate count. *See United States v. Molinaro*, 11 F.3d 853, 860 (9th Cir. 1993) (each execution of the scheme to defraud is a separate count of bank fraud). We now extend the same rule to health care fraud.

[13] Each submission of a fraudulent claim to a health care benefit program, rather than being simply an act in furtherance of a larger scheme to defraud, is a separate execution of the scheme and is itself chargeable as a separate count. Here, Defendant owed a new and independent obligation to be truthful each time he submitted one of the 24 fraudulent claims included in the indictment. Each claim carried a new form on which Defendant acknowledged his obligation to convey complete and truthful information. Each claim was independently paid by Medicare, and each exposed Medicare to financial loss. Each of the 24 counts required proof of an additional element that the other counts did not require: that the information in that specific claim, as distinct from the other claims, was false. Therefore, the indictment charging 24 counts of health care fraud was not multiplicatus.

C. *Jury Instructions Regarding Willfulness*

We review de novo whether jury instructions accurately define the elements of a statutory offense. *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir.

2000). If a jury instruction misstates an element of a statutory crime, the error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see also United States v. Henderson*, 243 F.3d 1168, 1171 (9th Cir. 2001).

Defendant argues that the jury instructions were erroneous because they stated that the government did not have to prove that Defendant knew his conduct was unlawful. Because the district court's instructions told the jury exactly the opposite of the Supreme Court's definition of "willfully," the instructions were erroneous. For the reasons explained below, however, the error was harmless beyond a reasonable doubt.

The jury was instructed in part:

> Defendants are charged in Counts 1 through 24 of the Indictment with health care fraud in violation of Section 1347 of Title 18 of the United States Code.
>
> . . . .
>
> In order for a defendant to be found guilty of health care fraud based upon a scheme to defraud, the government must prove four elements beyond a reasonable doubt:
>
> First, the defendant knowingly and willfully devised or participated in a scheme to defraud a health care benefit program;
>
> Second, the statements made or facts omitted as part of the scheme were material;

> Third, the defendant acted with intent to defraud; and
>
> Fourth, the scheme involved the delivery of or payment for health care benefits, items or services.
>
> . . . .
>
> For purposes of proving health care fraud, an act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. *The government is not required to prove that the defendant knew that his acts or omissions were unlawful.*
>
> . . . .
>
> For purposes of health care fraud, a person acts "willfully," as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally.

(Emphasis added.)

Defendant argues that the emphasized portion of the instructions is wrong because it contradicts the statutory requirement that he had to have acted "willfully."

The Supreme Court has recognized that "willfully" is a "word of many meanings" whose construction often depend on the context in which it appears. *Bryan*, 524 U.S. at 191. Generally, in the criminal context, a "willful" act is one undertaken with a "bad purpose." *Id.* The *Bryan* Court went on to state that, "in order to establish a 'willful' violation of a statute, '*the Government must prove that the defendant acted with knowledge that his conduct was unlawful.*' " *Id.* at191-

92 (emphasis added) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). The Court noted that one part of the jury instructions given in *Bryan*, which is identical interning to an instruction given in this case, misstated the law. In that part of the instructions, the judge had stated that the government was not "required to prove that [the defendant] had knowledge that he was breaking the law." *Id.* at199. That statement, standing alone, "contained a misstatement of the law," *id.*, given the rule that in order to establish a willful act the government *must* prove that the defendant knew that his or her conduct was unlawful, *id.* at 191-92.

[14] Relying on *Bryan*, we held in *Henderson* that the district court's failure to give a "general instruction that 'willfully' means that [a defendant] knew his [or her] conduct was unlawful" was in error. *Henderson*, 243 F.3d at 1173 (emphasis omitted). In *Henderson*, the defendant was convicted of violating a regulation governing the occupancy of public lands. *Id.* at 1170. The statute enforcing the regulation provided that "[a]ny person who knowingly and willfully" violates the regulation would be punished. *Id.* at 1171. The magistrate judge rejected the defendant's request to instruct the jury that willfulness requires "the specific intent to do or fail to do what [the defendant] knows is unlawful." *Id.* at1170. Instead, the judge instructed the jury only that "[t]he word 'willfully' means that a person knowingly and intentionally committed the acts which constitute the offenses charged." *Id.* We held that the instructions were erroneous, noting that *Bryan* required the prosecution to establish that the defendant was aware that the conduct in question was

unlawful. *Id.* at 1171-73.

But we went on to hold that the error in the judge's instructions was harmless beyond a reasonable doubt. *Id.* at 1173.The defendant had received a "Notice of Immediate Suspension" informing him that he was in violation of the regulation and that he had five days to comply. *Id.* We held that, once the defendant received the notice informing him that he was violating the regulation, he was aware that his conduct was unlawful. *Id.* at 1174. Therefore, even if the jury had been instructed that it had to find that the defendant knew his conduct was unlawful, that element undoubtedly would have been met. *Id.* In our view, "[n]o reasonable jury could have found that [the d]efendant lacked knowledge that his conduct was unlawful after the date he received the written Notice."*Id.* As a result, the magistrate judge's failure to give the defendant's requested instruction was harmless error. *Id.*

[15] We reach the same conclusion here. There was an error in the district judge's willfulness instructions. The instruction that "[t]he government is not required to prove that the defendant knew that his acts or omissions were unlawful"was erroneous under *Bryan*, 524 U.S. at 199.

[16] Nonetheless, the error was harmless beyond a reasonable doubt for three reasons. First, the certification on each claim that Defendant submitted to Medicare informed him that submitting "any false, incomplete or misleading information" could subject him to criminal liability and punishment— that is, the

certifications themselves stated that such submissions were unlawful. It is undisputed that Defendant signed these certifications, either physically or electronically, when he submitted each of the fraudulent claims. By submitting claims for treatments that either were not performed at all or that ran afoul of Medicare's supervision requirements, Defendant knew that he was committing an unlawful act that exposed him to criminal liability. He also received notification from Medi-Cal and Medicare, alerting him to problems with his claims. The fact that he stopped submitting Medi-Cal claims as soon as he was notified that his claims would be subject to heightened review, because an audit revealed billing problems, shows his guilty knowledge.

[17] Second, the instructions on health care fraud informed the jury that the government was required to prove that Defendant acted with an "intent to defraud." An "intent to defraud" was defined as "an intent to deceive or cheat." We must presume that the jury followed those instructions. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). In order to have found Defendant guilty, the jury necessarily found that Defendant acted with the purpose of deceiving or cheating Medicare. No reasonable jury could have found that a physician intended to deceive or cheat the Federal Government but did not know that such conduct is unlawful, especially in light of the warnings on the claim forms.

Other jury instructions also support our conclusion. The money laundering instruction informed the jury that the "government must prove that the defendant

knew that the funds transferred represented the proceeds of unlawful conduct, violation of the health care fraud statute." A guilty verdict on the money laundering counts means that the jury found that Defendant knew the actions which produced the money transferred were unlawful. Moreover, the jury was instructed that a good faith belief that the acts were lawful was a complete defense "because good faith on the part of the defendant is, simply, inconsistent with a finding of an intent to defraud."By finding Defendant guilty, the jury necessarily rejected the argument that Defendant acted with a good faith belief that his acts were lawful.

[18] Third, the fraudulent scheme was, for the most part, so bold and simple that no reasonable person could have thought it lawful. For example, Defendant billed for services not rendered—in common parlance, theft. Defendant moved from financial struggle to more than $2 million in paid claims over a period of about three years. His billings were wildly out of line with other physician's billings: With respect to one treatment, he billed 28 times the number and 42,000 times the amount of the next highest biller in Southern California. And he and his co-schemer consciously selected a vulnerable population that was unlikely to alert authorities.

[19] In short, Defendant carried out a brazen scheme to collect millions of dollars under obviously false pretenses, which no reasonable jury could have found to be lacking in willfulness. Therefore, although the district court's jury instructions on willfulness contained an error, that error was harmless beyond a

reasonable doubt.

D. *Sentencing Enhancement for Risk of Serious Bodily Injury or Death*

Finally, Defendant challenges the two-level sentencing enhancement that the district court applied for conduct involving "conscious or reckless risk of death or serious bodily injury." U.S.S.G. § 2B1.1(b)(12)(A) (2005). The court found that Defendant's failure to supervise treatments posed a risk of serious bodily injury to the patients. The court reasoned that"[m]ost if not all of the respiratory therapy administered was not required. The treatments included inhalation of medications. Medicare required that a treating provider be present in the facility where the treatment was given. This fact is indicative that the treatment carried some risk that the provider's immediate attention might be needed. [Defendant] was present for none of the treatments, thus placing each patient in risk."

The district court's interpretation and application of the Sentencing Guidelines are reviewed de novo. *United States v. Blitz*, 151 F.3d 1002, 1009 (9th Cir. 1998). But we review for clear error the court's factual findings. *Id.*

[20] Defendant argues that the respiratory therapies at issue were basic, non-invasive procedures that posed no risk of injury, serious or otherwise, to patients. He notes that no patients reported adverse side effects from the treatments. Nonetheless, it is only the "creation of risk, not the infliction of injury,"

that is required for application of this enhancement. *United States v. W. Coast Aluminum Heat Treating Co.*,265 F.3d 986, 993 (9th Cir. 2001). The government argues that Defendant's failure to supervise the treatments posed a risk because an adverse reaction to a treatment or medication could result in death or serious bodily injury. At trial, a therapist who worked with Defendant testified that she believed Defendant should have been present at all the treatments because of the risk of adverse side effects.

[21] The sentencing enhancement for creating a risk of serious bodily injury or death may not be proper in every prosecution for health care fraud, which is designed to punish financial fraud, rather than to enforce standards of medical care. But, in this case, there was evidence that a consistent failure to supervise jeopardized patients. In light of our deferential standard of review, we cannot say that the district court clearly erred in finding that Defendant's conduct posed a risk of serious bodily injury or death, even if we would not have made the same finding. We therefore reject Defendant's challenge to the sentencing enhancement.

AFFIRMED.

FILED
FEB 27 2009
MOLLY C. DWYER, CLERK OF COURT
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	) No. 06-50578) D.C. No. CR-04-) 00237-JVS-1
v.	)Central District of) California, Santa
AZIZ F. AWAD, Defendant - Appellant.	) Ana) **MANDATE**

The judgment of this Court, entered 1/12/09, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
By: Theresa Benitez
Deputy Clerk

FILED
FEB 19, 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 06-50578
Plaintiff - Appellee,	D.C.No. CR-04 -002374V-4RT Central District of California, Santa Ana
v.	
AZIZ F. AWAD, Defendant -Appellant.	

ORDER

Before: GRABER and CLIFTON, Circuit Judges, and REED,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Graber and Clifton have voted to deny the petition for rehearing en banc, and Judge Reed has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

District Court Tentative Sentence Memorandum
United States v. Awad, Case No. SACR 04-237 JVS

Sentencing Memorandum

This matter is before the Court for sentencing defendant Aziz F. Awad ("Awad") on his conviction on Counts I through 24 of the Indictment for violation of 18 U.S.C. § 1347, Medicare fraud, and Counts 25 through 28 of the Indictment for violation of 18 U.S.C. § 1956(a)(1)(A), money laundering. In arriving at a reasonable sentence as instructed by United States v. Booker, *543* U.S. 220 (2005), the Court has taken into consideration the United States Sentencing Commission Guidelines, the policies of the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a), and the specific facts of this case. The Court has reviewed the Presentence Report ("PSR") and the parties' submissions. As set forth below, the Court finds that a sentence of 180 months imprisonment represents a reasonable sentence in light of all of these factors.

1. Sentencing Guidelines.[1] The Court adopts the Guidelines analysis of the Presentence Report.

1.1. Offense Level. The Court concurs that the applicable guideline is Section 2S1.1 which looks to the offense from which the laundered funds were derived.

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[1] Although the Court considers the Guidelines first, the Court is mindful that the Guidelines are only a starting point in crafting a reasonable sentence, and, at least in this Circuit, carry no presumptive force in the analysis. United States v. Cantrell, 433 F.3d 1269, 1280 (9th Cir. 2006).

Section 2B1.1 covers fraud, including Medicare fraud, and provides a base offense level of 6. A number of enhancements are required, most of which Awad contests.

Amount of Loss. The Court finds that the amount of loss is in excess of $2.5 million, which requires an 18-level enhancement under Section 2B1.1(b)(1)(J). The Court rejects Awad's argument that the calculation should be limited to amount billed after January 1, 2002. In ruling on motions *in limine,* the Court set out at length the requirements for direct supervision. (See Minute Order, Nov. 14, *2005,* pp. 10-12.) However, as the Government points out, there were other misrepresentations in connection with the billings, such as place of service, which would have been sufficient for Medicare to reject the billings had it known the true facts. (Government Response, pp. 2-3.) Awad's attack on the inclusion of Medical billings would not reduce the amount of loss below $2.5 even if he were correct that such billings should not be counted.

Risk of Death or Injury. A 2-level enhancement is required under Section 2B1.1(b)(12) because the conduct involved risk of death or injury. Most if not of all of the respiratory therapy administered was not required. The treatments included inhalation of medications. Medicare required that a treating provider be present in the facility where the treatment was given. This fact is indicative that the treatment carried some risk that the provider's immediate attention might be needed. Awad was present for none of the treatments, thus placing each patient in risk.

Role as Manager. A 3-level enhancement is

required because of Awad's roles as a manager under Section 3B 1.1(b). The Court finds that Awad supervised *5* or more persons, and that in any event the criminal conduct was "otherwise extensive" as well. To mount a fraud on the scale here, Awad recruited "marketers," including Danny Du and Glenn Madrid, and a coterie of licensed and unlicensed therapists who visited multiple facilities. Careful management was essential to the efficient operation of the scheme which extended over 3 years.

Abuse of Trust. A 2-level enhancement is required because Awad abused a position of trust under Section 3B1.3. Awad was clearly in a position trust vis a vis his patients, and abused that trust by prescribing treatment that was not medically necessary and held potential risk for them. He also abused his position as a licensed Medicare provider. United States v. Rutgard, 116 F.3d 1270,1293 (9th Cir. 1997).

Vulnerable Victims. A 2-level enhancement is required because Awad's patients were vulnerable victims under Section 3A1.l(b)(1). Awad's scheme targeted residents in mental health care facilities, some of which were lock-down facilities, and through a scheme of bribes induced the patients to receive continued treatment. The scheme preyed on a group unlikely to complain and very likely to be compliant. As noted above, the scheme put the patients at risk because of the unnecessary and unsupervised treatments.

Obstruction of Justice. A 2-level enhancement is required for obstruction of justice Section 3C1.l. There are 2 bases for the enhancement. First, Awad directed the creation of false patient reports at a time he knew

Medicare was investigating his billing practices. Second, although he acknowledged his awareness of direct supervision requirements in his interviews with the FBI, he took the stand and denied knowledge of those requirements. Indeed, his main defense was that he could not have formed the intent to violate the Medicare statutes without that knowledge. His testimony was perjury.

The Court finds that the record establishes by a preponderance of the evidence the basis for each enhancement. The adjusted offense level is 35.

1.2. Criminal History. The Court concurs that the defendant's Criminal History Category is I, based on a lack of Criminal History points.

1.3. Departures. The Court acknowledges that it has discretion to depart from the sentence which results from an application of the Guidelines. The Court finds that there is no basis for a departure in this case.

1.4. Conclusion. The Court finds that proper application of the Guidelines calls for a sentence imprisonment for 168-210 months and a fine of $20,000 to $500,000.

2. Sentencing Reform Act. In arriving at a reasonable sentence, the Court considers the following factors outlined in the Sentencing Reform Act. The Court finds that the enhancements have a significant bearing on this analysis.

2.1. Nature of Circumstances of the Offense and History and Characteristics of Defendant. The fraud

scheme here was both far-reaching and long-lived. It was well organized and implemented, and resulted in a multimillion dollar loss to the Government. But far more than money was involved.

Awad breached his basic duty as a doctor to do no harm. Unnecessary and supervised treatments put his patients at risk. At least as troubling to the Court is the fact that the plot was cynical and calculating by targeting those in mental health facilities. The patients were manipulated by providing cigarettes, sodas and other sundries to induce them to continue treatment. The perverse irony of providing supposed respiratory patients with cigarettes reflects a particular callousness.

Notwithstanding his conduct in this case, Awad did engage in humanitarian activities in Viet Nam and other Asian countries, and the Court notes those activities.

2.2. Need for Sentence to Reflect Seriousness of Offense, to Promote Respect for Law, and to Provide Just Punishment. The Court finds that the Guidelines analysis has taken into account this factor.[2]

2.3. Need to Afford Adequate Deterrence of Criminal Conduct. The Court finds that the Guidelines analysis has taken into account this factor. A

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[2] By this the Court does not mean that the Guidelines analysis overrides the factors in Section 3553(a), but rather that the Court will consider the same facts only once unless the facts have additional or different significance under a Section 3553(a) analysis. The Court has noted where this is the case. United States v. Mix, 450 F.3d 375, 382 (9th Cir. 2006).

substantial sentence exceeding the equivalent of a low-end Guidelines sentence is necessary here to send the proper message to the hundreds of thousand of providers in the Medicare system. Any provider who exploits the system and exploits his patients to do so will face harsh consequences.

2.4. Need to Protect the Public. The Court finds that the Guidelines analysis has taken into account this factor.

2.5. Need to Provide Defendant Individualized Service Needs. This is not a factor in this case.

2.6. Kinds of Sentences Available. Because the Guidelines sentence falls within Zone D, the minimum term (168 months) must be satisfied through imprisonment. U.S.S.G. § 5C1.1(f).

2.7. Sufficiency of Punishment. The Court finds that the goals of the Sentencing Reform Act, particularly deterrence and punishment for the egregious nature of the conduct here, cannot be achieved with a sentence less than 180 months. Based on the considerations discussed above, the Court would impose the same sentence even if there were no advisory Guidelines to look to.

3. Facts of the Case. There are no additional facts which the Guidelines analysis and the other factors in Section 3553(a) have not taken into account or have not adequately taken into account.

4. Other Objections. The Court addresses the legal arguments raised by Awad, principally in his Supplemental Objections, filed August 31, 2006.

Ex Post Facto Clause. Awad contends that because Blakely v. Washington, 542 U.S. 296 (2004), reflected the applicable approach to sentencing at the time of his indictment, application of Booker is a violation the *Ex Post Facto* Clause of the Constitution. U.S. Constitution, Art. I, § 10. There are two short and complete answers. First, the Ninth Circuit has rejected the contention that retroactive application of Booker violates the *Ex Post Facto* Clause. United States v. Dupas, 419 F.3d 916, 919-21 (9th Cir. 2005). Second, and far more basic, the sentence imposed here is less than the 20-year statutory maximum for a single count of money laundering and less than the maximum for 2 counts of Medicare fraud. The statutes themselves would support a sentence of 320 years,[3] and they have not been changed during the pendency of this case.

Notice of Enhancements. Awad asserts that the indictment did not give him notice of the potential sentencing enhancements. The attack fails to appreciate the remedial portion of Booker. Moreover, as the Government points out, the Indictment spells out the conduct which forms the basis for the enhancements. (Government's Response to Defendant Aziz F. Awad's Supplemental Objections to PSR, pp. 8-9.)

Applicable Version of Guidelines. The Probation Officer used the November 1, 2005 of the Guidelines in preparing the PSR, which for present purposes is the same as the November 1, 2001 version. (PSR, ¶ 25.) Awad argues that because the Guidelines in effect prior to November 1, 2001 are more favorable to him in

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[3] This represents 10 years on each of the Medicare fraud counts (24 x 1 0) and 20 years on each of the money laundering counts (4 x 20): 240 + 80 320.

certain respects, they should control. Awad is correct that most of the Medicare fraud transactions occurred prior to November 1, 2001. However, he overlooks the on-going nature of the scheme which extended past November 1, 2001, and the fact that a version covering a later portion of the scheme may be applied to the whole scheme. United States v. Castro, 972 F.2d 1107, 1112 (9th Cir. 1992); U.S.S.G. § lBl .1 l(b)(3) and application note 2. To the extent relevant here, the 2001 version of the Guidelines is the same as the 2005 version, and the Probation Officer correctly used the 2005 version. In any event, the Guidelines are only a starting point in the reasonableness analysis mandated by Booker. See footnote 1, supra. Even if the advisory Guidelines produced an offense level of 32, applying Awad's view of the applicable version to the Probation Officer's analysis,[4] the Court would sentence no differently when it takes into account the factors under Section 3553(a) and the specific (egregious) facts of this case. See Section 2.7, supra.

Standard of Proof. As noted above (Section 1.1), the Court made its findings on the enhancements by a preponderance of the evidence. The Court believes that that is the correct standard. United States v. Watts, 519 U.S. 148, 156 (1997); United States v. Howard, 894 F.2d 1085, 1090 (**91h** Cir. 1999); see United States v. Dare, 425 F.3d 634, 642 (9th Cir. 2005). The Court does not believe that the sentencing enhancements here have worked an extremely disproportionate effect on the sentence relative to the offense of conviction. United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999). Assuming that a clear

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[4] See Government's Response to Defendant Aziz F. Awad's Supplemental Objections to PSR, p. 13 n5.

and convincing standard is required here, the Court would find that the evidence meets that standard. Awad's attacks on the enhancements are, by and large, a legal attacks and not a dispute on the sufficiency of the evidence.[5]

5. Conclusion. In setting this sentence, the Court has taken into account that it has discretion under both the Guidelines and Booker in setting Awad's sentence. As noted above, the Court has not exercised it discretion under the Guidelines, but in adopting the present sentence, the Court is mindful that whether a sentence falls within or without the Guideline range, the Court's ultimate decision is a reflection of its discretion. Particularly, in a case like this with complicated factors bearing on sentencing, whether analyzed under Guidelines or Booker discretion is the key ingredient in giving weight to the components in the analysis and arriving at a sentence which in light of all the factors is reasonable.

The Court finds that taking into account the analysis mandated by Booker, a sentence of 180 months imprisonment with a waiver of fine represents a reasonable sentence.

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[5] For example, in attacking the most significant enhancement, the amount of loss (18 levels), Awad contests the inclusion of charges other than the 24 identified in the Indictment and the inclusion of Medical charges. He does not contest the actual amounts themselves included in the PSR estimate.